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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JOHNNY GREEN, GAIL BLESSING, THERESA E. COVEYOU, GILDA MILLS, and JUDGE MILLS on behalf of themselves, their children, and all others similarly situated,
Petitioners,

v.

AGNES MARY MANSOUR, Director, Michigan Department of Social Services,
Respondent.

On Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

REPLY BRIEF FOR PETITIONERS

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ARGUMENT

I. Notice Relief Need Not Be Justified As Prospective Relief Or As "Ancillary" To Prospective Relief Because The Eleventh Amendment Bars Only Retroactive *Monetary* Relief Against A State Officer *Payable By The State Treasury.*

The Sixth Circuit decision below and respondent's brief are based upon the proposition that notice relief must be "ancillary" to a permanent injunction to be permissible under the Eleventh Amendment, because an injunction ordering notice relief otherwise constitutes prohibited "retroactive" relief. The key to this argument is the contention that *any* relief against a state officer based upon a "federal court ruling on the legal merits of a claim regarding a past violation of federal law" is "retroactive" relief. Respondent's Brief (R.B.) at 11. Respondent's argument is neither supported by the cases she cites nor consistent with other forms of relief that have been routinely approved by this Court, including the order for notice relief approved in *Quern* v. *Jordan*, 440 U.S. 332 (1979).

A. The Prospective-Retroactive Test Does Not Apply To Relief Which Has No Cognizable Fiscal Impact On The State Treasury.

All the cases that use the prospective-retroactive test have involved relief (against state officers) which had a monetary impact on the state treasury. This makes sense because the very purpose of the test is to solve the apparent conundrum that, though it is fiscal impact that pierces the fiction of *Ex Parte Young*, (see *Ford Motor Co.*, v. *Treasury*, 323 U.S. 459, 464 (1945) and *Edelman* v. *Jordan*, 415 U.S. 651, 663 (1974)), some relief with costly financial impact will be barred while other relief with equal if not greater fiscal impact will not. *Cf. Edelman*, 415 U.S. at 682 (Douglas J., dissenting).

In *Edelman*, the two forms of relief being distinguished were the district court's permanent injunction and its award of retroactive benefits, both of which had obvious financial impact. In discussing the relevance of earlier cases ordering costly though permissible prospective relief, this Court in *Edelman* clearly focussed upon the financial impact of the relief in question. See *id.* at 667-668, discussing *Ex Parte Young*, 209 U.S. 123 (1908), *Graham* v. *Richardson*, 403 U.S. 365 (1971), and *Goldberg* v. *Kelly*, 397 U.S. 254 (1970). The relief in these cases, though costly, was permitted because "the fiscal consequences to state treasuries in these cases were the necessary result of compliance with decrees which by their terms were prospective in nature." *Id.* at 667-668. The Court then distinguished the *Jordan* district court's prohibited award of retroactive benefits as "indistinguishable. . . from an award of damages against the state" because it was "a form of compensation" which was "measured in terms of a monetary loss resulting from a past breach of a legal duty. . ." *Id.* at 668.

All cases applying the prospective-retroactive test after *Edelman* have similarly involved relief with undeniable financial impact. See *e.g.*, *Milliken* v. *Bradley*, 433 U.S. 267, 277 (1977), *Hutto* v. *Finney*, 437 U.S. 678, 689-690 (1978), and *Florida Department of State* v. *Treasure Salvors Inc.*, 458 U.S. 670, 694-696 (1982). Since all the cases—those from which the prospective-retroactive test was derived and those to which it has been applied since *Edelman*—have involved monetary relief, it is an unwarranted extension of the test to apply it to non-monetary relief, such as notice relief. The *complete* summarizing sentence in *Edelman* underscores the point:[1]

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[1] Compare respondent's version of the quotation which removes the highlighted portion. R.B. at 10, 17-18.

> A federal court's remedial power, consistent with the Eleventh Amendment, is necessarily limited to prospective injunctive relief, *Ex Parte Young, supra, and may not include a retroactive award which requires the payment of funds from the state treasury, Ford Motor Co.* v. *Department of Treasury, supra.*

Id. at 677 (emphasis supplied).[2] Furthermore, unless the test is limited to remedies which involve *financial impact* on the state treasury, it would apply to the universe of *all* possible relief—including *non*-monetrary relief based upon and designed to remedy past misconduct—contrary to clearly established law, as shown below.

B. Respondent's Definition Of "Retroactive" Relief Would Bar Forms Of Non-monetary Relief Based Upon Determinations Of Past Misconduct That Have Long Been Approved By This Court.

There are a number of forms of "retroactive relief" (in respondent's sense of the term), other than notice relief, which this Court has approved. A good example is damage suits against state officers personally for violation of federal rights. See *e.g.*, *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974) and *Smith* v. *Wade*, 461 U.S. 30 (1983). In such

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[2] To similar effect is the text of the opinion in *Hutto* v. *Finney*, 437 U.S. 678 (1978):

> In the landmark decision in *Ex Parte Young* . . . , the Court held that, although prohibited from giving orders directly to a State, federal courts could enjoin state officials in their official capacities. And in *Edelman* v. *Jordan* . . . , when the Court held that the amendment grants the state an immunity from *retroactive monetary relief*, it reaffirmed the principle that state officers are not immune from prospective injunctive relief.

Id. at 690 (emphasis supplied). See also *id.* at 695. n.24. Cf. *Atascadero State Hospital* v. *Scanlon*, ____U.S. ____, 105 S.Ct. 3142, 3153-78 (1985), (Brennan, J., dissenting) (Eleventh Amendment should not apply to federal question cases at all).

cases the federal court clearly adjudicates the legality of past conduct, yet the Eleventh Amendment does not bar either the adjudication or the remedial relief so long as that relief does not have any prohibited impact on the state treasury. As this Court observed in *Scheuer* v. *Rhodes:*

> While it is clear that the doctrine of *Ex Parte Young* is of no aid to a plaintiff seeking damages from the public treasury, [citing *inter alia Edelman*], damages against individual defendants are a permissible remedy in some circumstances notwithstanding the fact that they hold public office. . . . [P]etitioners allege facts that demonstrate they are seeking to impose individual and personal liability on the *named defendants* for what they claim. . . was a deprivation of federal rights by these defendants under color of state law. . . .[T]heir claims, as stated in the complaints, . . .are not barred by the Eleventh Amendment.

416 U.S. at 238 (emphasis by the Court).

Habeas corpus cases are another example. The federal court issues its writ based upon a determination that a state trial violated the federal constitution. While one might characterize this relief as "retroactive" since it is based upon a finding that state officials in the past breached their federal duties to the plaintiff, the relief awarded does not have any prohibited impact on the state treasury. As this Court said in *Ex Parte Young:*

> . . .[P]ersons in the custody of state officers for alleged crimes against the state have been taken from that custody and discharged by a federal court or judge, because the imprisonment was adjudged to be in violation of the Federal Constitution. The right to so discharge has not been doubted by this Court, and it has never been supposed there was any suit against the State by reason of serving the writ upon one of the officers of the state in whose custody the person was found. . . .

209 U.S. at 167-168. The distinction which allows *habeas* relief notwithstanding the Eleventh Amendment is not whether that relief is retroactive or prospective (as understood by respondent), but the fact that such relief is ordered against a state officer and has no monetary impact on the state treasury and thus is not a suit against the state.

In fact, federal courts routinely order state officials to take affirmative actions to redress past violations of federal rights. For example, in *Papish* v. *Curators of the University of Missouri*, 410 U.S. 667 (1971), the Court held that plaintiff was illegally expelled from school, and ordered the university officials "to restore to petitioner any course credits she earned for the semester in question and, unless she is barred from reinstatement for valid academic reasons, to reinstate her as a student in the graduate program." *Id.* at 671.[3]

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[3] *See also Skehan* v. *Board of Trustees of Bloomsburg State College*, 538 F.2d 53, 63 (3rd Cir. 1976) (*en banc*), on remand from 421 U.S. 983 (1975) (instructing district court to consider "prospective reinstatement (as to which there is no [Eleventh Amendment] immunity problem) . . ."), 590 F.2d 470, 486 (relying on *Young* and *Edelman* to explain why "the Eleventh Amendment presented no impediment to Skehan's request for prospective reinstatement as relief for the constitutional violations he established," but prohibited an order for back pay); and *Brook* v. *Thornburgh*, 497 F.Supp 560 (E.D. Pa. 1980). See also *Perry* v. *Sinderman*, 408 U.S. 593, 603 (1972) (proof of a legitimate claim of entitlement to continue employment "would obligate college officials to grant a hearing, [where plaintiff] . . . could be informed of the grounds for his nonretention and challenge their sufficiency."). See also *Goldberg* v. *Kelly*, 397 U.S. 254, 267-271 (1970) (substitute procedural safeguards ordered for welfare recipients facing terminations of benefits). Other forms of affirmative non-monetary relief in employment or school dismissal cases would include orders to expunge official records of an illegal dismissal or suspension. See *Piphus* v. *Carey*, 545 F.2d 30, 32 (7th

Each of the above forms of "retroactive" relief would be barred under respondent's reading of the sweep of the *Edelman* decision and the Eleventh Amendment. Such a reading would eliminate the federal courts' power to remedy past violations of federal rights. To protect the supreme authority of federal law, this power should be limited only when the relief "impose[s] a liability which must be paid from the public funds in the state treasury . . . ," *Edelman*, 415 U.S. at 663, and then only when that liability "is measured in terms of a monetary loss resulting from a past breach of a legal duty." *Id.* at 668. It is only in that circumstance that the "state [becomes] the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are named defendants." *Ford Motor Co.* v. *Department of Treasury*, 323 U.S. 459, 464 (1945), quoted in *Edelman*, 415 U.S. at 663. See Burnham, Federal Court Remedies for Past Misconduct by State Officials: Notice Relief and the Legacy of *Quern* v. *Jordan*, 34 Am. U.L. Rev. 53, 81-85 (1984).

C. Notice Relief Is Permitted Because It Has No Prohibited Financial Impact On The State Treasury Even Though It Is Ordered Based In Part Upon A Finding Of Past Misconduct Of State Officials.

The notice relief approved in *Quern*, of course, is the prime example of permissible non-monetary relief based upon a determination of past misconduct by state officials. As the *en banc* Seventh Circuit recognized, "[i]t cannot be strongly argued that the problem [of notice relief] did not arise in part from a past breach." 563 F.2d at 878. See also *id.* at 874 (recognizing that the notice relief requested was sought on behalf of a sub-class of "applicants who had

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Cir. 1976), modified on other grounds, 435 U.S. 247 (1978). See also *id.*, 435 U.S. at 252.

applied for AABD since July 1, 1968, and whose applications were not timely processed as required by federal regulations"). Yet, that court held that the modified notice relief was not barred because it did not "provide[] for actual retroactive payments." *Id.* at 876. See also *id.* (the Eleventh Amendment is "not a total and complete bar so long as [the relief ordered] does not constitute a retroactive award for damages to be paid by state funds"). The Court of Appeals' reasoning was explicitly approved of by this Court in *Quern:*

> In the [*en banc* Seventh Circuit's] view, such a notice would not violate the distinction set forth in *Edelman* between prospective relief, which is permitted by the Eleventh Amendment, and retrospective relief, which is not:
>
> > "The form of notice we envisage would not create a 'liability' against the state. Whether a liability might result would be a matter for state determination, not the federal court. No federal judgment against the state would be created. Such a notice could not be labeled equitable restitution or be considered an award of damages against the state. . . ."

Id. at 336, quoting *Jordan* v. *Trainor,* 563 F.2d 873, 876 (7th Cir. 1977) (*en banc*). Thus, the reason why the order for notice relief "would not violate the distinction between prospective and retrospective relief" was because such a test would be relevant only if the order for notice relief amounted to "equitable restitution or . . . an award of damages against the state." *Id.* This Court in *Quern,* of course, determined that it did not. See *Id.* at 347-348.[4]

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[4] Not surprisingly, it was precisely the differing views of *Edelman* played out here that distinguished the decision of the Third Circuit in *Fanty* v. *Commonwealth of Penn. Dept. of Public Welfare,* 551 F.2d 2

Respondent nonetheless argues that the Seventh Circuit and this Court in *Quern* "did not approve an order directing state officials to inform a class of plaintiffs 'that their federal rights had been violated in the past.'" R.B. at 19. In support of this contention, respondent cites the *en banc* Seventh Circuit's discussion of what was wrong with the district court notice. This is not a correct reading of either the *en banc* Court of Appeals' opinion or of this Court's affirmance of that decision in *Quern*.

The distinction made by the Seventh Circuit—between a *determination of past misconduct* accompanied by an order to send notices and a *determination of present liability to pay* retroactive benefits—has already been

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(3rd Cir. 1977), cert. denied 440 U.S. 957 (1979), from the *en banc* Seventh Circuit decision in *Jordan* v. *Trainor*, *supra*. This fact is important since the Court granted certiorari in *Quern* to resolve the conflict between those two decisions. 440 U.S. at 334, 346. In *Fanty* the Third Circuit denied notice relief because, as argued by respondent here, it viewed *Edelman* as holding that any "form of redress for a 'past breach of a legal duty' " was barred. *Fanty*, 551 F.2d at 4. The *en banc* Seventh Circuit took the contrary view that the Eleventh Amendment is not "a total and complete bar so long as [the relief ordered] does not constitute a retroactive award for damages to be paid by state funds." *Jordan* v. *Trainor*, 563 F.2d at 876. In emphasizing in *Quern* that "[t]he Court in *Edelman* considered only the constitutionality of the relief before it," 440 U.S. at 347 n.18, and in holding that the notice relief, as modified by the *en banc* Seventh Circuit, did not have prohibited financial impact on the state treasury, *id.* at 347-348, this Court adopted the view of the *en banc* Seventh Circuit and that put forth by petitioners here, and rejected the Third Circuit's position in *Fanty* and respondent's view here. See also Quern v. *Jordan*, 440 U.S. 332 (1979), Brief of Respondent Jordan at 11-14, 23-31, and 35-47 (arguing that *Edelman* and its progeny bar only retroactive monetary relief) and Brief of Petitioner Quern at 14-29 (arguing that *Edelman* bars any exercise of Federal judicial power concerning past action or inaction of state officers).

pointed out. P.B. at 39-40. Any doubt about the Seventh Circuit's thinking on this point is settled by its reference to *Grubb* v. *Sterrett*, 315 F.Supp 990 (N.D. Ind. 1970), *aff'd mem.* 400 U.S. 922 (1970). Referring to *Grubb*, the Seventh Circuit observed:

> That decision provided for notice to members of the class whose applications for Indiana public assistance had *previously been denied* under a regulation *subsequently held to be invalid*. The notice was to contain no prejudgment of state liability. The state was left to make the eligibility determination according to federal and state regulations.

563 F.2d at 876 (emphasis supplied).

Just as clearly as *Grubb* did *not* adjudicate *present liability* on the part of the state to *pay* retroactive benefits or order that they be paid, it *did* adjudicate, in 1970, the legality of Indiana's stepparent regulation back to the effective date of the federal regulation which it violated—August 8, 1968. The district court's opinion states:

> Since the HEW regulation . . . defining when the presence of a stepparent would make a child ineligible for AFDC assistance became effective August 8, 1968, all decisions on eligibility for AFDC made after that date which were inconsistent with this federal regulation were incorrect.

315 F.Supp at 995-996. Based upon this finding, the district court's judgment ordered Indiana to notify all persons denied assistance "*after August 8, 1968 . . . that the 'stepfather' regulation has been invalidated. . . ,*" and that "they may appeal . . . the denial or termination [of assistance] . . . *for the period during which it was denied. . . .*" *Id.* at 996, (emphasis supplied). Thus, the Seventh Circuit clearly distinguished, as did the district court in *Grubb*, between a *declaration of past illegality*

and a *determination of present liability* for payment of lost benefits. Under the Eleventh Amendment, a federal court must limit itself to the former activity.[5]

II. Even If The Prospective-Retroactive Test Applies To Both Monetary And Non-Monetary Relief, Notice Relief Qualifies As Prospective Relief.

Even if the prospective-retroactive test does apply to *all* relief which a federal court might order, "[notice] relief

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[5] Respondent correctly argues that the *Quern* notice was a "mere explanatory notice" which told class members "no more . . . than they would have gathered by sitting in the courtroom." 440 U.S. at 349, quoting 563 F.2d at 877-878. However, class members "sitting in the courtroom" surely would have "gathered," as did the panel of the Seventh Circuit in the first appeal, that "[t]he district court . . . found defendants to be noncompliant [with federal promptness processing regulations] *from and after the effective date of the regulations* [July 1, 1968]" (emphasis added). 472 F.2d at 996, rev'd on other grounds *sub nom. Edelman* v. *Jordan*, 415 U.S. 651 (1974). More importantly, this Court's discussion of the Eleventh Amendment in *Quern* reflects that it, too, "gathered" that the district court had determined that the state regulation was invalid during the time that AABD applications of the 1968-71 class were processed. In observing that there were "numerous missing links" in the "chain of causation" between the order for notice relief and any eventual order of retroactive benefits, this Court pointedly did not mention the most obvious "missing link" which could sever the chain even for class members who chose to take advantage of state procedures—the possibility that the state regulations under which those applications were processed might have been *valid* from 1968 to 1971. Even the parties in *Quern* "gathered" that the district court had declared the past actions of Illinois officials to be in violation of federal law. On remand, the defendant state officials agreed to a group hearing decision (that class members would receive in response to notice) which stated that "[t]he federal court in *Jordan* v. *Quern* found that AABD benefits were wrongfully withheld from [class members] who applied for AABD between July 1, 1968, and April 16, 1971." *Jordan* v. *Quern*, 71 C 70, Stipulation, Exhibit C, (ND Ill Sept. 27, 1979) (lodged with the Clerk of the Court). The cases decided since *Quern* similarly reflect federal question determinations of past misconduct. See Notice Relief Excerpts, App. *infra* at A-1.

falls on the *Ex Parte Young* side of the line rather than on the *Edelman* side." *Quern*, 440 U.S. at 347. This is so because, like *habeas corpus* cases, disciplinary school or employment record expungement cases, orders for reinstatement of an illegally dismissed student or public employee, and the order for compensatory education programs in *Milliken II*, the relief ordered, while in part based upon and designed to remedy a *past* breach of a federal duty, is also in part based upon and designed to remedy a concommitant *present* federal duty to remove the continuing effects of that past misconduct.

The *present* federal duty—found in federal regulations regarding administrative hearings and correction of underpayments—is to eliminate the continuing effects of that past breach by notifying class members of their right to a hearing at which they may be able to recover benefits illegally denied in the past. As such, an order for notice relief, to paraphrase *Milliken II*, is based upon the present and continuing federal statutory and regulatory duty "to take the necessary steps 'to eliminate . . . all vestiges of'" past illegal denials of benefits and is "designed to restore" class members "to the position they would have enjoyed absent . . . violation by state . . . officials." 433 U.S. at 290, 281. Upon receipt of the notices, welfare class members are placed back in the position they were in when they were first denied benefits with the same important difference noted in *Millikan II*—because of the federal court ruling that state policy was illegal under federal law, state determinations of whether they may obtain an award of retroactive benefits will be made "absent" the illegal aspects of that state policy.

Regarding her federal duties vis-a-vis past underpayments, respondent argues that Section 602(a)(22) applies only to underpayments as defined and determined by the *state* alone. R.B. at 35. This, respondent argues, is

supported by the definition of underpayment in 45 CFR § 233.20(a)(13)(ii), which states that an underpayment is determined by reference to whether the recipient was "eligible." But the concept of eligibility underlying § 602(a)(22) must be construed *in pari materia* with § 602(a)(10) as to which this Court has held that "[e]ligibility, so defined [in 602(a)(10)] must be measured by federal standards." *Carleson* v. *Remillard*, 406 U.S. 598, 600 (1971). See also *Townsend* v. *Swank*, 404 U.S. 282, 286 (1971) and *King* v. *Smith*, 392 U.S. 309 (1968). It is highly unlikely that HHS, in referring to an "eligible assistance unit" when defining underpayments in 45 CFR § 233.20(a)(13)(ii), or Congress, in requiring that "any . . . underpayment of aid" be "promptly . . . correct[ed]" in § 602(a)(22), would somehow have in mind eligibiity according to *state* standards, no matter how contrary to federal law those standards might be.

Even if § 602(a)(22) is applicable to corrective payments only within the context of the state administrative hearing process (see R.B. at 36), petitioners here, as was the case in *Quern*, seek notice relief directed primarily at the possibility of recovery *through that very hearing mechanism*. At no point have petitioners requested any order compelling direct payment pursuant to § 602(a)(22). Respondent concedes that she has a federal and state duty to correct past underpayments accomplished in violation of federal law at least in the context of the fair hearing mechanism, (see R.B. at 36), and this is all that is necessary to support an order for notice relief.

III. For Eleventh Amendment Purposes, The Reason For The Lack Of Any Future Conflict Between State And Federal Law Is Irrelevant.

In her brief (at 26-27), respondent distinguishes *Silva* v. *Vowell*, 621 F.2d 640 (5th Cir. 1980) and *Appleyard* v.

Wallace, 754 F.2d 966 (11th Cir. 1985), on the ground that neither of those cases involved a change in federal law. What difference this should make is not clear. If the crux of respondent's argument is that under *Ex Parte Young* an ongoing permanent injunction (to remedy *future* violations) is a necessary predicate for notice relief (to remedy *past* violations), then whether the absence of such a permanent injunction is attributable to a change in federal law or to the defendant's voluntary change in policy should make no difference whatsoever. See also P.B. at 16 n.11; Burnham, 34 Am. U.L. Rev. at 57 n.10.[6] Thus, the respondent makes a distinction without a difference, and the petitioners' support in the Fourth, Fifth, Ninth, and Eleventh Circuits cannot be seriously doubted. See P.B. at 27, 30.

Even if respondent's distinction of *Silva* and *Appleyard* made analytical sense, the line she seeks to draw does not apply here. In both of the present cases below it was not the change in federal law *per se* that eliminated a future conflict, but also respondent's voluntary changes in state policy to comply with the new federal law. But for those voluntary changes, ongoing conflict with the *new* federal law would have remained, and petitioners surely would have amended their complaint to challenge the inconsistencies between the new federal requirements and the prior state practice. See P.B. at 2-3, 4-5; J.A. at 96-97, 43.

Under respondent's theory of *Ex Parte Young*, *Edelman*, and *Quern*, eleventh-hour voluntary compliance with federal law would be sufficient to divest the

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[6] The federalism interests are clearly the same in both situations. In addition, when only notice relief is ordered, the intrusion on state sovereignty is far less than in cases like *Ex Parte Young*, where relief much more intrusive upon state functions was approved.

federal court of jurisdiction to consider any non-monetary relief for past unlawful acts no matter how longstanding the illegal policy or how egregious its contravention of federal law. The federal court would have to dismiss not just the claim for relief against future application of that policy but also the claims of all those persons whose federal rights were violated in the past. See *Davis* v. *City of Los Angeles*, 440 U.S. 625, 631 (1979). The result would be that unscrupulous state officials could violate clear federal requirements whenever it suited their purposes, knowing full well that each day of delay would never be remedied.

The present cases are illustrative. Regarding the stepparent issue, this Court had decided no fewer than four cases invalidating state policies denying or reducing AFDC eligibility based on the assumption of support from persons without a legal obligation to support coextensive with that of natural or adoptive parents. See *King* v. *Smith*, 392 U.S. 309 (1968) (man-in-the-house); *Solomon* v. *Shapiro*, 300 F.Supp 409 (D. Conn. 1969), *aff'd mem.* 396 U.S. 5 (1970) (stepparent); *Grubb* v. *Sterrett*, 315 F.Supp 990, *aff'd mem.* 400 U.S. 922 (1970) (stepparent); and *Lewis* v. *Martin*, 397 U.S. 552 (1970) (stepparent). See also 45 CFR § 233.90(a)(1). In the child care expense case, *Shea* v. *Vialpando*, 416 U.S. 251 (1974), directly applied to Michigan's total refusal to allow deductions of child care expenses incurred by working recipients. See also HHS correspondence, J.A. at 69-72. Yet, under respondent's theory, she would have the power to avoid *any* federal court determination of the illegality of her policies by simply deciding—presumably at any point before entry of judgment—to do finally what federal law had required her to do all along.

IV. *Quern* v. *Jordan* Determined That Potential Difficulties In Pursuing State Judicial And Administrative Remedies Are Irrelevant To The Propriety Of Entering An Order For Notice Relief.

In *Quern*, as here, state officials argued that class members' claims would be barred in subsequent state proceedings. 440 U.S. at 348 n.20. This Court, while acknowledging that "[t]hese facts may influence a plaintiff class member in deciding whether to pursue existing state administrative remedies . . .", deemed the arguments "not at all relevant to the question of the propriety of the notice fashioned by the Court of Appeals" and concluded that such considerations "do not affect our conclusion that the notice relief awarded . . . is permissible under the Eleventh Amendment." *Id.* The issue of whether any such claims are time-barred is similarly "not at all relevant" to the Eleventh Amendment issues discussed here.

In any event, petitioners have a number of arguments which they could make in the state courts to avoid limitation problems. Respondent asserts that "as in the *Tomanio* case [446 U.S. 478 (1980)], Michigan also has no tolling statute which would apply in this case." R.B. at 33. This assertion is utterly without foundation. The two Michigan cases cited by respondents in support of this proposition demonstrate its falsity. See *Buscaino* v. *Rhodes*, 385 Mich. 474, 189 N.W. 2d 202 (1971) and *Stewart* v. *Michigan Bell Telephone Co.*, 39 Mich. App. 360, 197 N.W. 2d 465 (1972). In construing the provisions of MCLA 600.5856, both of these cases quote the Committee Comments on the applicability of that section where a prior lawsuit has been filed:

> In the event of the dismissal, on some ground other than on the merits (as for example—lack of jurisdic-

> tion over the subject matter) of an action in which [personal] jurisdiction over the defendant is acquired, the period of time from the time of service or the acquisition of jursidiction over the defendant until dismissal will not count as part of the time of limitation, for during such time the statute has been tolled.

Buscaino, 189 N.W. 2d at 206; *Stewart*, 197 N.W. 2d at 468.

None of the puzzling over applicable rules of limitation or tolling evidenced in *Tomanio* would be necessary here. Michigan law requires that claimants exhaust federal remedies before filing in the Court of Claims, MCLA 600.6440. Michigan law also specifically states that filing in federal court within three years is a timely filing, MCLA 600.6452(1), and that the normal tolling rule applies to all Court of Claims actions, MCLA 600.6452(2). See App. *infra* at A-3.[7]

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[7] Respondent's other arguments—that the 90-day state time limit on requests for administrative hearings would bar any relief after judgment in this case, or that respondent's actions are unreviewable after 90 days—are also without merit. In effect these arguments would require the exhaustion of administrative remedies clearly foreclosed by *Patsy* v. *Board of Regents*, 457 U.S. 496 (1983), see also *King* v. *Smith*, 392 U.S. 309, 312 n.4 (1968), or would impose a 90-day statute of limitations on § 1983 actions, contrary to *Burnett* v. *Grattan*, 468 U.S. ____, 78 L.Ed. 2d 357 (1984), and *Wilson* v. *Garzia*, 471 U.S. ____, 85 L.Ed 2d 254, 265 (1985). Furthermore, in both cases below the federal class actions were filed within 90 days of the named plaintiffs' negative case actions. (J.A. at 14, 119.) Petitioners would also argue that because their notices were defective under MAC R400.902, the 90-day period has not yet begun to run. See MAC R400.904(4) and Declaration of Johnny Green, ¶ 11, 14 (J.A. at 131, 132), and Consent Judgment, ¶ 4(b), *Card* v. *Dempsey*, Civil Action No. 7-70131 (E.D. Mich 1977), appendix to this Brief at A-5. Finally, petitioners would note that in the stepparent case the respondent

V. Petitioner's Claims For Relief Are Not Moot.

Respondent appears to argue that because petitioners' claims for declaratory and injunctive relief are barred by the Eleventh Amendment, the case should be dismissed on mootness grounds. Respondent's argument amounts to an assertion that when all relief is barred, a case is "moot." Obviously, the same could be said of cases dismissed, *e.g.*, for failure to state a claim, or for failure to prove a claim, or for failure to file a claim within the statute of limitations. To say that such failings make the case "moot" adds nothing to the analysis and needlessly distorts the mootness doctrine.

The respondent is also wrong. As the Sixth Circuit correctly found, in both cases below petitioners' retained "a legally cognizable interest [personal stake] in the outcome" such that the dispute over entry of an order for notice or declaratory relief presented a "live" case or controversy, (even though the claims for injunctive relief against future violations were mooted in October, 1981). J.A. at 163, 164-167. See *Geraghty* v. *U.S. Parole Commission*, 445 U.S. 388, 396 (quoting *Powell* v. *McCormick*, 395 U.S. 486, 496 (1969); see also *Super Tire Engineering Co.* v. *McCorkle*, 416 U.S. 115, 121-122 (1974). Of all of the recent Eleventh Amendment litigation on this point, respondent is unable to point to a single case

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denied classmembers' *timely* requests for hearings on the grounds that the issue raised was unappealable, see *e.g.*, Form Letter of April 1, 1981, Gruesbeck to Graf, appendix to this Brief at A-8, and then, after entry of the preliminary injunction, respondent denied subsequent hearing requests as *untimely*. See Graf Hearing Decision dated January 25, 1982, appendix to this Brief at A-9. See also *Brinkerhoff-Faris Co.* v. *Hill*, 281 U.S. 673 (1930), *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 434-435 (1982), and Burnham, 34 Am. U.L. Rev. at 96 n.225, n.226.

where her mootness argument has succeeded. Indeed, those cases which consider mootness reject respondent's argument and go on to decide the Eleventh Amendment issues. See *e.g.*, *Banas*, J.A. at 163-167, *Simpson* v. *Miller*, 93 FRD 540, 543-545 (N.D. Ill. 1982), *Moore* v. *Miller*, Civil Action No. 81-C-7265, Memorandum and Order, (N.D. Ill. 6/28/85), Appendix to this Brief at A-12. Finally, this Court implicitly rejected respondent's argument when it decided the *Quern* case rather than dismissing it on mootness grounds. Especially after the abolition of the AABD program in 1973, the same mootness argument advanced by respondent here could have been made about the motion for notice relief in the *Jordan* litigation since, in that case as in the present one, the sole surviving claim for coercive relief was the request for notice relief. See P.B. at 12 n.7, and *Moore* v. *Miller*, *supra*, Appendix to this Brief at A-18.[8]

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[8] Just such an argument was made by one of the judges forming the majority in *Fanty* v. *Commonwealth of Penn. Department of Public Welfare*, 551 F.2d 2 (3rd Cir. 1977). In *Fanty*, Judge Garth argued that "[s]ince the only personal interest the named plaintiffs have ever had is a possibility of ultimately obtaining reimbursement through proceedings in a state forum, there was never any 'immediacy' to their federal claims." 551 F.2d at 8 (Garth, J. concurring). By the time the *en banc* Seventh Circuit decided *Jordan* v. *Trainor*, 563 F.2d 873 (7th Cir. 1977) (*en banc*), it had the benefit of Judge Garth's advice before it. That court referred to the Article III "problem" raised by Judge Garth, *Jordan*, 563 F.2d at 874, but it obviously did not agree with him. It did not dismiss on jurisdictional grounds and, to the contrary, approved a form of notice relief to the named plaintiff and the class. In *Quern* v. *Jordan*, this Court also acknowledged Judge Garth's belief that "there was no case or controversy." *Quern*, 440 U.S. at 334 n.2. This Court nonetheless proceeded to decide the propriety of the notice relief ordered by the Seventh Circuit. Thus, by deciding the *Quern* case on the merits, this Court necessarily determined that a claim for notice relief constitutes a justiciable case or controversy under Article III. See Burnham, 34 Am. U.L. Rev. at 102-103.

CONCLUSION

The judgment of the Court of Appeals should be reversed, and the case should be remanded with the directions that declaratory and notice relief are not barred by the Eleventh Amendment, and may be entered if petitioners prevail on the merits of their motion for summary judgment.

Respectfully submitted,

/s/ _____
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APPENDIX

NOTICE RELIEF EXCERPTS

Fabula v. *Buck*, 538 F.2d 869, 874 (4th Cir. 1979) (holding Maryland transfer-of-assets rule invalid under federal law and remanding case for appropriate relief "with provisions for notice to members of the plaintiff classes apprising them of this decision and of any administrative procedures available to them under state law"); *Randall* v. *Lukhard*, 536 F.Supp 723 (W.D. Va. 1981) (declaratory relief holding pre-July 1981 state medicaid policy invalid under then existing federal law) and No. 80-50-C, Memorandum Opinion and Order (W.D. Va. July 22, 1982) (notice provided: "Before July 1, 1981, Virginia had a [transfer of assets] rule . . . by which state officials denied Medicaid eligibility to people . . . A federal court in Charlottesville, Virginia, has recently declared that state rule invalid. THE COURT ORDERED THE STATE TO TELL PEOPLE WHO WERE DENIED MEDICAID BECAUSE OF THIS RULE THAT THEY MAY BE ABLE TO RECOVER MONEY SPENT OR OWED IN THE PAST FOR WHICH MEDICAID WOULD HAVE PAID FOR. . . .") (lodged with the Clerk of the Court), *modified on other grounds*, 729 F.2d 966 (4th Cir. 1984) (*en banc*), *cert. denied* ___ US ___, 105 S.Ct. 222 (1984); *Beltran* v. *Myers*, [1982 Transfer Binder] CCH Medicaid and Medicare Guide Par. 31,835 (N.D. Cal. Feb. 4, 1982) ("Case authority and the interpretation of the responsible federal agency overwhelmingly indicate that the California transfer rule was prohibited by federal law in effect through June 30, 1981.") and No. 78-2350 CBM (Mx), exhibit A attached to order, at 1 ("A federal court in Los Angeles has recently declared [California's transfer of assets rule] invalid. THE COURT ORDERED THE STATE TO NOTIFY PEOPLE WHO WERE DENIED ELIGIBILITY IN THE PAST BECAUSE OF THIS RULE THAT THEY MAY BE ABLE TO RECOVER AMOUNTS WHICH WERE SPENT OR OWED IN THE PAST which the Medi-Cal program should have been paying for." (lodged with the Clerk of the Court), *aff'd* 701 F.2d 91, 94 (9th Cir. 1983) ("The notice required [by

the district court] falls within the guidelines of *Quern* v. *Jordan*, . . ."), *cert. denied sub nom. Rank* v. *Beltran*, ___ US ___, 103 S.Ct. 3115 (1983); *Herweg* v. *Ray*, 481 F.Supp 914, 918 (S.D. Iowa 1978) (notice provided: "On January 19, 1978, the federal district court for the Southern District of Iowa declared that the Iowa Department of Social Services was in violation of federal law by its method of computing . . . income . . . under the Medicaid program.") *aff'd* 619 F.2d 1265 (8th Cir. 1980) (*en banc*), *rev'd on other* grounds 455 US 265 (1982); *Silva* v. *Vowell*, 621 F.2d 640, 651 (5th Cir. 1980) (notice provided: "The United States District Court for the Southern District of Texas, Brownsville Division, has ruled that the disability standard under which your application or claim for AFDC-I benefits may have been evaluated, did not conform to federal standards."), *cert. denied sub nom Johnston* v. *Silva*, 449 US 1125 (1981); *Appleyard* v. *Wallace*, 754 F.2d 955, 962 (11th Cir. 1985) (quoting notice from *Silva* with approval).

600.6440 Same; remedy in federal court as bar to jurisdiction

Sec. 6440. No claimant may be permitted to file claim in said court [of claims] against the state nor any department, commission, board, institution, arm or agency thereof who has an adequate remedy upon his claim in the federal courts, but it is not necessary in the complaint filed to allege that claimant has no such adequate remedy, but that fact may be put in issue by the answer or motion filed by the state or the department, commission, board, institution, arm or agency thereof.

600.6452 Same; filing of claim, time, limitation of actions

Sec. 6452. (1) **Filing of claim.** Every claim against the state, cognizable by the court of claims, shall be forever barred unless the claim is filed with the clerk of the court or suit instituted thereon in federal court as authorized in section 6440,[1] within 3 years after the claim first accrues.

(2) **Limitation of actions.** Except as modified by this section, the provisions of RJA chapter 58,[2] relative to the limitation of actions, shall also be applicable to the limitation prescribed in this section.

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[1] Section 600.6440.

[2] Section 600.5801 et seq.

600.5856 Tolling of statute; filing of summons and complaint; service on defendant

Sec. 5856. The statutes of limitations are tolled when

(1) the complaint is filed and a copy of the summons and complaint are served on the defendant, or when

(2) jurisdiction over the defendant is otherwise acquired, or when,

(3) the complaint is filed and a copy of the summons and complaint in good faith, are placed in the hands of an officer for

immediate service, but in this case the statute shall not be tolled longer than 90 days thereafter.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil Action No. 770131

JOSEPHINE CARD, ALFREDA BURBRIDGE, GAIL GRIFFIN, WESTSIDE MOTHERS WELFARE RIGHTS ORGANIZATIONS, on behalf of its members, and all plaintiffs individually and on behalf of all others similarly situated,

Plaintiffs,

v.

JOHN T. DEMPSEY, Individually and in his official capacity as Director, Michigan Department of Social Services,

Defendant.

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* * * *

FINAL CONSENT JUDGMENT

[excerpt]

4. For the protection of those class members who file requests for administrative hearings after the date of this Final Consent Judgment (hereafter "future class members") and in order to protect those past class members who may not be identified through the procedures outlined in the immediately preceding paragraph, the following actions shall be taken and shall be deemed adequate protection for such absent past and future class members:

. . . . . .

b. The defendant shall notify all Administrative Law Judges in the Department of Social Services that there is no limitation on the amount of retroactive Food Stamp benefits which may be awarded through the hearing process, and that

a fair hearing does not begin to run until or unless the household is notified in writing by way of a notice of adverse action which comports with the requirements of 7 C.F.R. 271.1(n) (1977) or any successor regulation. Under this requirement, a request for a hearing to contest delays in processing a household's application will always be timely unless the household received notice of adverse action and its request for hearing was filed over 90 days after the date of such notice.

* * *

/s/ John Feikens
United States District Judge

Approved for Entry:

Michigan Legal Services
Attorneys for Plaintiffs

July 29, 1977

By: /s/
WILLIAM BURNHAM
KENNETH LEE LEWIS

FRANK J. KELLEY
Attorney for Defendant

By:
ROBERT N. ROSENBERG
Assistant Attorney General

EXHIBIT C-3-

REQUEST FOR HEARING
Michigan Department of Social Services

INSTRUCTION: Complete all items below. (Please type or print.) Send completed form in envelope provided or, mail to:

Department of Social Services
Bureau of Administrative Hearings
P.O. Box 30041
Lansing, Michigan 48909

Caroline Graf
K 3 026299A 3/16/
63 01 46 05

Date Completed DSS-18 Received From Claimant

This request for hearing concerns the follow (check one or more):

☐ ADC Grant ☐ Food Stamps ☐ Level of Nursing Care ☐ General Assistance
☐ Medical Assistance ☐ Services ☐ Licensing ☒ Other

I request an administrative hearing before an Administrative Law Judge regarding the decision of _____ (Name of County or State Division)
Department of Social Services. Following are my reasons for requesting a hearing.

Please do not close my stepparent Grant because it will cause a hardship on my whole family and we would all end up on ADC

Traced by Mary Wild

IMPORTANT: PLEASE ENCLOSE NOTICE YOU MAY HAVE RECEIVED WHICH CAUSED YOU TO REQUEST A HEARING.

Signature of Person Requesting Hearing	signed by Caroline Graf	Telephone Number	Date
Street Address or Route Number	City, State, and Zip Code		
293 Helwig St	Rochester, Mi 48063	852-9495	3/16/81

TO BE COMPLETED ONLY IF AN ATTORNEY HAS AGREED TO REPRESENT YOU AT THE HEARING

Name of Attorney	Firm or Society	Telephone Number
OCWRO	OCWRO	
Street Address or Route Number	City, State, and Zip Code	
70 Lastone	Pontiac 48058	

EXHIBIT C-3

EXHIBIT C-3-

April 1, 1981

:Ms. Carolyn Graf
1036 Melvir
Rochester, MI 48063

RE: Graf, Carolyn, Request received March 23, 1981
0333 X5025299A

Dear Ms. Graf:

Your request for a hearing has been received, however, it will not be scheduled for a hearing because it involves an automatic grant adjustment required for a class of recipients and does not involve an incorrect grant computation.

The Michigan Administrative Code 400.903(3) provides the following:

> "A hearing shall not be granted when either state or federal law requires automatic grant adjustments for classes of recipients, unless the reason for an individual appeal is incorrect grant computation."

We are returning your request. The change in your grant will take effect on the date listed in the notice you received since a hearing cannot be granted.

Sincerely,

Ronald M. Gruesbeck, Director
Bureau of Administrative Hearings

RMG/mkw

Enclosure

cc: Oakland County DSS
Oakland County

STATE OF MICHIGAN
DEPARTMENT OF SOCIAL SERVICES
BUREAU OF ADMINISTRATIVE HEARINGS

IN THE MATTER OF:
CAROLYN GRAF,
Claimant

Reg. No. 81-16214 (1034)
Case No. 063 K5026299A
Hearing Date: 12-2-81
Oakland County DSS

HEARING DECISION

This matter is before the Administrative Law Judge pursuant to MCLA 400.37; MSA 16.437 and MCLA 400.9; MSA 16.409 upon claimant's request for a hearing to protest the department's refusal to pay retroactive aid to dependent children (ADC) benefits. A telephone hearing was conducted.

ISSUE

Does jurisdiction exist to hear claimant's request for retroactive benefits?

FINDINGS OF FACT

The Administrative Law Judge, upon the competent, material and substantial evidence on the whole record, finds as material fact:

(1) Claimant was an ADC recipient whose grant was cancelled on 4-7-81 because of excess income based upon the minor's stepparent's income being considered in determining eligibility in accordance with departmental policy then existing. A notice advising claimant of the department's proposed action was mailed to her on March 81.

(2) On 10-28-81 the claimant requested retroactive benefits from March through August of 1981.

(3) The department paid to claimant the benefits from June 16, 1981 to August, 1981 in the amount of $170.50 in accordance with departmental policy reflected in Social Services Letter #1000-81-44.

(4) Claimant seeks retroactive ADC benefits from March, 1981 to June 15, 1981, based upon her present request for a hearing dated 9-12-81.

(5) Claimant's child was financially eligible for ADC benefits from and including March to June 15, 1981.

CONCLUSIONS OF LAW

The ADC program is established pursuant to Title IV of the Social Security Act which is implemented by Title 45 of the Code of Federal Regulations (CFR) and administered by the Department of Social Services.

The initial question is whether the Bureau of Administrative Hearings has jurisdiction to hear a claim for benefits that existed in March of 1981 based upon a hearing request filed on 9-12-81.

45 CFR Section 205.10(a)(5)(iii) provides that the State plan for ADC shall provide for a system of hearings under which the claimant shall be provided reasonable time, *not to exceed 90 days*, in which to appeal an agency action. (Emphasis added). See also DSS MAC Rule 400.904(4); APM Item 630, page 2.

Claimant was sent a negative action notice of her grant cancellation in March 1981 which was effective on 4-7-81. Her request for a hearing to contest the grant cancellation was filed on 9-12-81. This was far in excess of the 90-day period allowed for this Bureau to have jurisdiction to hear and decide this matter.

DECISION AND ORDER

The Administrative Law Judge upon the above findings of facts and conclusions of law, decides that no jurisdiction exist to hear and decide this claimant's request for a hearing.

Therefore, claimant's hearing request is hereby dismissed.

/s/ John N. Atkinson
JOHN N. ATKINSON
Administrative Law Judge

Date signed: 1-25-82
Date mailed: Jan 26, 1982

NOTICE: The law provides that within 30 days of receipt of the above Decision and Order the claimant may appeal it to the circuit court for the county in which she lives.

JNA:jj

cc: Carolyn Graf
Dorothy Brow
Oakland County DSS
A. John Vielbig
Don Czinder
Judge John N. Atkinson
Administrative Hearings (2)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 81 C 7265

SHARON MOORE and JIMMIE MOORE, JOHNNY JEFFERSON, individually on behalf of all persons similarly situated,
Plaintiffs,

v.

JEFFERY MILLER, Director of the Illinois Department of Public Aid, and the ILLINOIS DEPARTMENT OF PUBLIC AID,
Defendants.

JUL 12 '85

MEMORANDUM AND ORDER

In *Quern* v. *Jordan*, 440 U.S. 332 (1979), the Supreme Court approved a district court order requiring notice be sent to class members informing them of the state administrative avenues available for retrospective monetary relief if the members were improperly denied benefits. The Court found the notice to be "ancillary" to the prospective relief already ordered by the district court and allowed by *Ex Parte Young*, 209 U.S. 123 (1908), and *Edelman* v. *Jordan*, 415 U.S. 615 (1974). Plaintiffs in the present case seek notice relief even though this court's injunction regarding the handling of benefit payments has been rendered a nullity by a change in federal law. The Fourth Circuit [should read Sixth Circuit] has held such notice relief unavailable. *See Banas* v. *Dempsey*, 742 F.2d 277 (4th Cir. [sic] 1984), *cert. granted sub nom Green* v. *Mansour*, 105 S.Ct. 1863 (1985). The *Banas* court found that notice relief was required to attach to some prospective injunctive relief and because none existed notice relief would not be allowed. This court disagrees and grants the notice relief requested.

I. HISTORY

Plaintiff filed this class action complaint in December 1981, attacking the Illinois Department of Public Aid's method of

determining income levels with regard to receipt of earned income credits. In December 1983 this court granted plaintiffs motion for a preliminary injunction. *See Moore* v. *Miller*, 579 F.Supp. 1188 (N.D. Ill. 1983).[1] The court held that IDPA had to have a reasonable certainty of EIC eligibility before deducting expected receipt of EIC payments from a recipient's income in the calculation of AFDC benefits and could not rest upon assumptions. Effective October 1, 1984, the Deficit Reduction Act of 1984, Public Law No. 98-369, § 2629, changed the federal statute to allow crediting a recipient's income with an EIC payment only if an EIC payment is actually received. *See* 42 U.S.C. § 602(d)(1) (1985). This standard is in accord with the IDPA's practice after this court's grant of a preliminary injunction and this court's order of May 4, 1984.

Now before the court is plaintiff's motion for summary judgment, seeking declaratory and notice relief as well as permanent injunctive relief. Defendants also move to dissolve the preliminary injunction issued by this court in 1983. In addition, plaintiff's motion for class certification still remains from its filing at the inception of this action.

II. INJUNCTION

Plaintiffs move for a permanent injunction regulating the crediting of EIC payments to AFDC recipient's incomes. At the same time defendants move to dissolve the present preliminary injunction. Due to the change in the law, and without any indication that defendants interpret that law differently than espoused in their briefs, the court would be disposed to dissolve the injunction but for an uncertainty respecting reimbursement of persons who had ceased being recipients between December 1983 and May 1984, when IDPA changed its policy and thereafter reimbursed those entitled who were still recipients. Dissolution of an injunction is warranted after a "showing of changed circumstances so that continuance of the

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[1] A more detailed history of this case is included in that memorandum and order.

injunction is no longer justified and/or because it will work oppressively against the enjoined parties." *American Optical Co.* v. *Rayex Corp.*, 291 F.Supp. 502, 510 (S.D.N.Y. 1967), *aff'd* 394 F.2d 155 (2d Cir.), *cert. denied* 393 U.S. 835 (1968). The changed law is just such an occurrence. Defendant's position before the issuance of the preliminary injunction was reasonable, though found by this court to be erroneous. To maintain that position in face of a changed law would not be reasonable. The court finds the purpose of the preliminary injunction has been largely fulfilled, the complained-of conduct has been discontinued, and such conduct is unlikely to recur. *See Burgoyne* v. *Lukhard*, 410 F.Supp. 477 (E.D. Va. 1976). No gain can come by continued supervision by this court, except for resolution of the one outstanding matter. Accordingly, the preliminary injunction regulating defendant's crediting of EIC payment in the calculation of a recipient's income is continued only for the limited purpose indicated.

III. CLASS ACTION

With the preliminary injunction largely dissolved, it is now appropriate to determine the motion for class certification before proceeding further. Defendants raise two arguments against certification. First, they claim that plaintiff Sharon Moore is not qualified to represent the class due to financial information gleaned during discovery. This attack may well be justified, but plaintiff Jefferson is still capable of representing the class and thus certification can occur. Defendant's second argument is stronger. They claim that because prospective injunctive relief is no longer sought, plaintiff's claims are moot and class certification is not warranted.

Judge Marshall, in *Simpson* v. *Miller*, 93 F.R.D. 540 (N.D. Ill. 1982), dealt with the identical issue facing this court. In *Simpson*, plaintiffs, complaining of erroneous calculations of income for AFDC purposes, sought class certification and notice relief after a change in federal law made any claim for prospective injunctive relief moot. Judge Marshall, in analyzing defendant's claim of mootness, applied the two-part test

enunciated in *United States Parole Commission* v. *Geraghty*, 445 U.S. 388, 396 (1980). First, he found that plaintiff had a live interest in the outcome of the litigation because they continued to be denied the full extent of the benefits they did not receive due to the IDPA's failures. *See Simpson* v. *Miller*, 93 F.R.D. at 543. Plaintiffs still claim a present need for notice relief. Second, he found plaintiffs had a personal stake in the claim for notice relief. He made this finding because the purpose of the personal stake requirement, to ensure an adversarial presentation of concrete issues, remained satisfied by plaintiffs' request for notice relief. *Id.* at 545.

This court finds Judge Marshall's analysis in *Simpson* fully applicable to the present action, and notes that the *Banas* court followed a similar analysis. Plaintiffs in this case do continue to have a live controversy. They complain of shortfalls in their past AFDC payments. These shortfalls have not yet been remedied. They seek notice relief informing them of their administrative remedies. In addition, both plaintiffs and the IDPA are vigorously trying this action with the stakes heavy for both sides. The court finds plaintiffs' claims for notice relief not to be moot. [2]

The court now turns to Rule 23 considerations for certification of the class. The court finds the four enunciated requirements for Rule 23(c) to be satisfied. This class is much too large to allow joinder. The defendant reimbursed 11,000 recipient families for shortfalls falling between the issuance of the preliminary injunction and the state's change in their policy. It is expected that more can properly seek notice relief over the four-year period contested. Common questions of law and fact concerning the state's policy regarding EIC payments exist at the crux of this case. Typicality, at least as far as the relief that

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[2] As in *Simpson*, certification is occurring here after the change in the law. This court, in agreement with Judge Marshall, sees no mootness problem arising because of that timing. *See Simpson* v. *Miller*, 93 F.R.D. at 545 (1982).

can be awarded by this court, exists. Finally, the court finds that plaintiff Jefferson, and the attorneys handling this action, have fairly and adequately protected the interests of the class.

In the present case the IDPA has acted "on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Rule 23(b)(2). Thus, a Rule 23(b)(2) class is appropriate. Because the present action satisfies the requirements of Rule 23, and the case is not moot, this court grants plaintiffs' motion for class certification.

IV. DECLARATORY RELIEF

Plaintiffs seek declaratory relief against defendants. Such relief, as long as directed against state officials and not the state itself, is permissible within the constraints of the Eleventh Amendment. *See* 13 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure*, § 3225 at 194 (2d Ed. 1984). Plaintiffs seek a declaration that between October 1, 1981 and October 1, 1984 defendants were required to calculate EIC payments in accordance with the standards set out in this court's previous memorandum.

Having reviewed its previous memorandum and order, this court agrees with its earlier conclusion. Buttressing the findings in that memorandum and order is an AFDC action transmittal, #SSA-AT-84-7, dated April 24, 1984. That transmittal requires calculations consistent with this court's ruling and inconsistent with defendants' practice before this court's ruling. The court grants defendants' motion for declaratory judgment.

The purpose of this declaratory action is to ensure proper adjudication of requests for reimbursement filed through state administrative procedures. Under the federal statutes states are required to correct any underpayment of aid. *See* 42 U.S.C. § 602(a)(22) (1985). The amount of underpayment is calculated following regulations extant at the time of the underpayment. *See* 45 C.F.R. § 233.20(a)(13)(ii) (1982). The declaratory relief

would ensure that any administrative determinations of past underpayments would be adjudicated in conformity with this court's earlier findings.

V. NOTICE RELIEF

Finally, having largely dissolved the injunction and granted declaratory relief, the court now turns to the remaining issue: notice relief. Plaintiffs seek court ordered notice informing class members that they may have been underpaid due to the IDPA's policies and informing them of the state administrative remedies. The court in *Quern* v. *Jordan*, 440 U.S. 332 (1972), found such notice relief in a similar situation appropriate when it was "ancillary to the prospective relief already ordered by the court." *Id.* at 349.

The Sixth Circuit, in *Banas*, 742 F.2d 277, relied on this "ancillary" language in denying notice relief. The *Banas* court found that notice relief was not by itself within the contours of relief allowed by *Ex Parte Young*. It noted the fiction of *Young*, that prospective injunctive relief was not an action against the state but instead an action requiring state officials to comply with federal law, and then interpreted *Quern*'s "ancillary" language to be some sort of tacking-on of notice relief to the *Young* relief, as in the concept of ancillary jurisdiction. When further prospective relief is no longer required, the court found there is nothing to which to tack on notice relief and thus such relief runs afoul of the eleventh amendment.

> Because it is the function of *Young* that shelters such ancillary orders from not being orders against the state, when the basis of that fiction—the need for injunctive relief to force state officials to comply with federal law—disappears, so does the shelter.

742 F.2d at 288. In this district, Judge Grady has explicitly followed the reasoning of the *Banas* court. In *Dandridge* v. *Coler*, No. 84 C 930 (N.D. Ill. Jan. 25, 1985), the court found that plaintiff's request for notice relief was not allowed because not "ancillary to something more than a declaratory judgment governing past official conduct," and thus found no valid claim

for relief. *See id.*, slip at 6. *See also Colbeth* v. *Wilson*, 554 F.Supp. 539, 546 (D.Vt. 1982), *aff'd sub nom. Colbeth* v. *O'Rourke*, 707 F.2d 57 (2d Cir. 1983).

This court is somewhat puzzled by the above cases. The argument constructed by the *Banas* court, and accepted in *Dandridge*, is theoretically consistent with *Ex Parte Young* and a defensible interpretation of certain language in *Quern*, but is inconsistent with results actually achieved in that litigation. The history of the *Quern* litigation, filed in this district, is crucial to the present determination. The action was filed because of failures of the IDPA to promptly commence Aid to the Aged, Blind and Disabled (AABD) payments to eligible recipients. The district court granted both injunctive and retroactive damage relief to plaintiffs. In *Edelman* v. *Jordan*, 415 U.S. 651 (1974), the Supreme Court found the retroactive damage relief to be violative of the Eleventh Amendment. Significantly, however, by the time the *Edelman* decision was rendered, the AABD program was no longer in operation. *See id.* at 653 n.2. It had been replaced by the federally funded and administered supplemental security income program. *Quern* v. *Jordan*, 440 U.S. at 348 n.20. The case thus went back to the district court in a posture where any prospective relief was mooted by the dissolution of the program and thus no prospective injunctive relief existed. The court ordered notice relief and, after modification by the Seventh Circuit, this grant of notice relief was affirmed by the Supreme Court in *Quern*. Thus, the Court in *Quern* allowed notice relief even though there really wasn't any ongoing prospective injunctive relief to which to attach the notice relief.

This necessarily brings into question the Sixth Circuit's interpretation of the term "ancillary" used in *Quern*. The most common legal use of "ancillary," and the one followed by the Sixth Circuit in *Banas*, is in the realm of subject matter jurisdiction, where one claim, for which no subject matter jurisdiction exists, for reasons of convenience and fairness, is attached onto a claim properly before the court. *See e.g. Owen Equipment & Erection Co.* v. *Kroger*, 437 U.S. 365 (1978). This usage,

on its face, does not seem applicable to eleventh amendment cases because jurisdictional tacking-on allowed by the concept of ancillary jurisdiction for fairness and convenience seems no basis for allowing federal court adjudication of a claim otherwise not allowed by a specific amendment to the Constitution. In Eleventh Amendment cases, however, the term "ancillary" has taken on additional legal meaning. In *Edelman*, the court held that retrospective damage awards were not allowed because they came directly from a state's treasury, but it allowed prospective injunctions, even though such injunctions inevitably cost the state money. These inevitable costs were found to be a permissible and often inevitable "ancillary effect on the state treasury." *Edelman*, 415 U.S. at 668. In *Quern* itself, the court noted, in its only other use of the word "ancillary," that prospective injunctions may have "an ancillary effect on the state treasury." *Quern* v. *Jordan*, 440 U.S. at 337. In these usages, "ancillary" seems to refer to inevitable and permissible costs.

Two factors convince this court that notice relief is itself prospective relief and that "ancillary" in that context means "an inevitable and permissible cost" which is an acceptable part of the prospective relief. First, as stated previously, such is the prior usage of the word in Eleventh Amendment cases and in the *Quern* case. *See Quern* v. *Jordan*, 440 U.S. at 337; *Edelman* v. *Jordan*, 415 U.S. at 667. The *Quern* decision, in a short substantive discussion of the notice issue, found that notice relief "falls on the *Ex Parte Young* side of the eleventh amendment line rather than on the *Edelman* side" because the claim of causation between the notice relief ordered and the payment of retrospective damages had many "missing links." *Quern*, 440 U.S. at 347. Notice relief does not itself entail a federal direction of reimbursement. Rather, it advises possible claimants of a possible state administrative procedure by which claims can possibly be filed and paid. It looks toward future action by claimants and the state. Similarly, the citation to the portion of *Milliken* v. *Bradley*, *supra*, which discusses the prospective nature of programs designed to "bring about the delayed bene-

fits of a unitary system," 433 U.S. at 290, seems to emphasize the court's finding that notice relief is itself prospective in nature, even though designed to facilitate the payment of past shortfalls and thus be acceptable under the Eleventh Amendment even without a pending prospective injunction.

Second, and most significant, is the allowance of notice relief in *Quern*, even though there was no effective ongoing injunction. This court is wary of placing too much emphasis on one word in a Supreme Court opinion, but it is on that word that the *Banas* court rested its decision. This court disagrees with the interpretation in *Banas*. That disagreement can perhaps be underscored by the application of the *Banas* court's reasoning to the facts in this case. The preliminary injunction here was entered in December 1983 (and it has not been entirely dissolved, although this court does not rest on that fact). In May 1984 the state changed its policy so as to go beyond what this court believed in December to be its federal obligations. That change was identical to the obligations created by federal law in October 1984. IDPA contends that injunctive relief was no longer necessary after May 1984. If there had been no change in the federal statute the Department would be advancing the same contention that it advances now, the bar of the Eleventh Amendment, on the basis of the *Banas* court reasoning. Notice relief would then depend upon whether a court did or did not believe that a continuation of injunctive relief was appropriate. This court does not believe that the application of the Eleventh Amendment with respect to notice relief should or does turn upon a discretionary judgment concerning the continuation of equitable relief. In the fictional world relating the Eleventh Amendment to remedies for official misconduct or error, the concept adds but another and unwarranted uncertainty.

In *Quern*, this court believes, the Supreme Court held that notice relief is permissible prospective relief without regard to an injunctive order and even though it has an ancillary impact upon a state treasury. In light of such an interpretation, notice relief is warranted here.[3]

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[3] For a more detailed application of this issue, reaching the same

CONCLUSION

The change in federal law has largely negated the need for continuing prospective relief but it has not negated the reasons for continuing this suit. Pursuant to the reasoning in this Memorandum and Order, the court finds the following relief appropriate:

(1) The preliminary injunction is dissolved, except to the extent stated herein·

(2) Plaintiffs' motion for class certification is granted;

(3) Plaintiffs' motion for declaratory relief is granted; and

(4) Plaintiffs' motion for notice relief is granted.

The parties are instructed to submit proposed notice forms within fifteen days to this court.

/s/ James B. Moran
JAMES B. MORAN
Judge, United States District Court

June 28, 1985

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result, *see Burnham*, Retroactive Welfare Benefits: Federal Class Actions after *Edelman* v. *Jordan*, Commerce Clearing House Review, July 1984 at 225. [Citation should read National Clearinghouse for Legal Services, Clearinghouse Review.]